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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARTURO GARCIA ROJAS, Defendant and Appellant.	H045848 (Santa Clara County Super. Ct. No. C1350761)

Defendant Arturo Garcia Rojas pleaded no contest to four counts of forcible lewd or lascivious conduct with a child under the age of 14 years (Pen. Code, § 288, subd. (b)(1))[1] in exchange for 40-year prison sentence. The trial court sentenced defendant to the agreed upon 40 years, but the abstract of judgment indicates that defendant was convicted of and sentenced on *five* violations of section 288, subdivision (b)(1). As the Attorney General concedes, reversal and remand for resentencing is required.

[1] All further statutory references are to the Penal Code unless otherwise noted.

I. BACKGROUND[2]

In March 2014, the Santa Clara County District Attorney filed an information charging defendant with four counts of oral copulation or sexual penetration with a child 10 years of age or younger (§ 288.7, subd. (b), counts 1-4); one count of forcible lewd or lascivious conduct with a child under the age of 14 years (§ 288, subd. (b)(1), count 5); infliction of corporal injury on an intimate partner (§ 273.5, subd. (a), count 6); and misdemeanor child endangerment (§ 273a, subd. (b), count 7). Count 5 was alleged to have occurred on February 22, 2013. The trial court later dismissed counts 6 and 7 on the prosecutor's motion.

A jury convicted defendant on the five remaining counts and the trial court sentenced defendant to a prison term of 60 years to life, consecutive to eight years, on December 4, 2015. That sentence consisted of 15 years to life on counts 1 through 4 and the midterm sentence of eight years on count 5, all running consecutively.

Defendant timely appealed. In our prior opinion, issued on June 28, 2017, we held that the trial court had erroneously admitted hearsay and that the error was prejudicial. Accordingly, we reversed the judgment and remanded the matter for possible retrial.

On January 26, 2018, the prosecutor amended the information so that all five counts alleged forcible lewd or lascivious conduct with a child under the age of 14 years in violation of section 288, subdivision (b)(1). That same day, defendant pleaded no contest to counts 1 through 4 in exchange for a 40-year prison sentence.

On March 23, 2018, the trial court sentenced defendant to an aggregate prison term of 40 years. At the sentencing hearing, the trial court did not explain how it

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[2] This is the second time this matter has been before this court. In 2017, a panel of this court reversed defendant's convictions on grounds the trial court prejudicially admitted hearsay evidence. (*People v. Rojas* (June 28, 2017, No. H043116) [nonpub. opn.].) Our summary of the procedural background includes some information set forth in our prior opinion. The facts are fully set forth in that opinion. Because they are not relevant to the instant appeal, we do not repeat them here.

calculated that sentence, other than to say that it was "adopt[ing] the prison matrix which is set forth on page 2 of the supplemental probation report as written." The minute order and abstract of judgment indicate that the court sentenced defendant to the middle term of eight years on counts 1 through 5, with the sentences running consecutively. The trial court imposed various fines and fees. The court calculated those fines and fees that are imposed on a per-conviction basis based on five convictions. For example, the court imposed a $200 court security fee under section 1465.8, subdivision (a)(1), which mandates the imposition of "an assessment of forty dollars ($40) . . . on every conviction for a criminal offense . . . ." And the court imposed a $150 criminal conviction assessment fee under Government Code section 70373, subdivision (a)(1), which calls for the imposition of a $30 assessment on every felony conviction.

The court awarded defendant a total of 1,168 days in presentence credits: 1,016 actual days plus 152 days pursuant to section 2933.1. The court awarded defendant 840 actual days of postsentence credit "with CDCR to calculate the good time/work time credits." The supplemental probation report indicates that the presentence custody credits were awarded from February 22, 2013 (the date of defendant's arrest) to December 4, 2015 (the date of defendant's initial sentencing). And it indicates that postsentence credit was awarded for the period from the initial sentencing to the second sentencing.

Defendant timely appealed.

II. DISCUSSION

The trial court erroneously sentenced defendant on *five* section 288, subdivision (b)(1) convictions when he pleaded to only *four* counts. That sentence plainly was unauthorized. Accordingly, as defendant and the Attorney General agree, the judgment must be reversed and the matter must be remanded for resentencing.

Defendant also argues that the trial court erred in its award of presentence and postsentence credits. According to defendant, the court erroneously failed to award him presentence credits for the period from the reversal of his original convictions to his

postplea sentencing. The Attorney General calls defendant's argument "reasonabl[e]," but does not take a position as to how credits should have been awarded, saying instead that the trial court "will have an opportunity to consider the argument . . . on remand."

"The Penal Code provides that inmates in county jails and state prisons may have their sentences reduced as a reward for their conduct, including work and good behavior. The rate at which inmates accrue credit depends on numerous factors, including whether the confinement is presentence or postsentence." (*In re Martinez* (2003) 30 Cal.4th 29, 31 (*Martinez*).) "For custody before a sentence is imposed, persons detained in a county jail, or other equivalent specified local facility, a defendant may be eligible to receive, in addition to actual time credits under Penal Code section 2900.5, presentence good behavior or worktime credits." (*People v. Donan* (2004) 117 Cal.App.4th 784, 789 (*Donan*).) " 'Once a person begins serving his prison sentence, he is governed by an entirely distinct and exclusive scheme for earning credits to shorten the period of incarceration. . . . Such prison worktime credits, once earned, may be forfeited for prison disciplinary violations and, in some cases, restored after a period of good behavior. (§§ 2932, 2933, subds.(b), (c).) Accrual, forfeiture, and restoration of prison worktime credits are pursuant to procedures established and administered by the Director. (§§ 2932, subd. (c), 2933, subd. (c).)' (*People v. Buckhalter* [(2001)] 26 Cal.4th [20,] 31.)" (*Id*. at p. 790.)

Where a defendant's conviction is reversed, and the defendant thereafter is again convicted and sentenced to state prison, our Supreme Court has identified four custodial "phases" for purposes of credit accrual: "Phase I is the period from the initial arrest to the initial sentencing . . . . Phase II is the period from the initial sentencing to the reversal . . . . Phase III is the period from the reversal to the second sentencing . . . , and phase IV is the period after the second and final sentencing." (*Martinez*, *supra*, 30 Cal.4th at p. 32.) In *Martinez*, the court concluded that the petitioner's phase II custody should be treated as postsentence time. The court explained that "the determination of

her phase II credits" was controlled by her "ultimate phase IV status as a convicted second striker, not her unresolved phase III status as presentence petitioner, nor her initial phase II status as a convicted third striker . . . ." (*Id.* at p. 37.)

At issue here is the proper characterization of phase III time from reversal to second sentencing. The *Martinez* court explicitly declined to "express any opinion as to the proper characterization of phase III time." (*Martinez*, *supra*, 30 Cal.4th at p. 34, fn. 4.) That issue was not before the court because the parties agreed "that petitioner should accrue credits as a presentence inmate for phases I and III . . . ." (*Id.* at p. 32.)

In *Donan*, our colleagues in the Second Appellate District held that phase III custody should be treated as presentence time, relying largely on *Martinez*. (*Donan*, *supra*, 117 Cal.App.4th at p. 792.) But, as noted, the *Martinez* court did not weigh in on the issue.

Given that defendant must be resentenced, and in the absence of input from the Attorney General, we decline to definitively decide how defendant's phase III time should be characterized for purposes of credit accrual.

III. DISPOSITION

The judgment is reversed, and the matter is remanded for resentencing.

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ELIA, ACTING P. J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, J.

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MIHARA, J.

People v. Rojas
H045848